U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEON de los REYES and DEPARTMENT OF THE NAVY, NAVAL SUBMARINE BASE, Groton, CT

Docket No. 01-1167; Submitted on the Record;
Issued April 12, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant is entitled to a schedule award as a result of an employment-related lumbar spine injury.

This is the second appeal in this case.[1] On the first appeal, the Board reviewed a July 17, 1995 decision, by which the Office denied appellant's claim for a recurrence of disability on or around November 27, 1993. The Board set aside the case on the grounds that there was insufficient evidence in the record upon which to make a determination. On remand, following further development of the medical evidence, on June 16, 1999 the Office accepted appellant's claim for a recurrence of disability on or around November 23, 1993. The complete facts of this case are set forth in the Board's December 24, 1998 decision and are herein incorporated by reference.

On December 22, 1999 appellant filed a claim for a schedule award for permanent impairment. Appellant submitted a report dated August 19, 1996 from Dr. Frank W. Maletz, his treating Board-certified orthopedic surgeon, finding that appellant had reached maximum medical improvement and assigning appellant a 35 percent lumbar spine impairment rating, or 28 percent impairment of the whole person.

By decision dated January 2, 2001 and finalized January 8, 2001, the Office denied appellant's claim for a schedule award as the spine is not a scheduled member under section 8107 of the Federal Employees' Compensation Act.

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[1] Docket No. 96-1722 (issued December 24, 1998). In the present case, on October 19, 1989 the Office of Workers' Compensation Programs accepted that appellant sustained a herniated disc at L4-5 and L5-S1, contusions and a low back sprain as a result of an August 14, 1989 employment injury. The Office has also accepted that appellant sustained recurrences of disability on December 11, 1989 and July 23, 1990 as a result of the accepted injury. The Office further accepted that back surgery undergone by appellant on May 9, 1994 was causally related to the accepted employment injury and thus authorized payment of the bills relating to this surgery. Finally, on June 16, 1999 the Office accepted appellant's claim for recurrence of disability on November 27, 1993.

The Board has duly reviewed the record in the present appeal and finds that this case is not in posture for a decision, due to an unresolved conflict in the medical evidence.

The schedule award provisions of the Act[2] and its implementing regulation[3] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. No schedule award is payable for a member, function or organ of the body not specified in the Act or in the regulations.[4] As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or cervical spine, or for the whole person,[5] no claimant is entitled to such an award.[6] However, amendments to the Act in 1960 modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originates in a scheduled or nonscheduled member. As the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originates in the spine, if the medical evidence establishes impairment as a result of the employment injury.[7] However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.

In his August 16, 1996 report, in which he rated appellant's degree of permanent impairment, Dr. Maletz indicated that appellant had "marked gait abnormality" when observed and walked with "hiking hip motions," but further noted that "motors, reflexes and sensibilities are preserved," muscle tone in the lower extremity was essentially normal, there was no evidence of loss of function in the L3, 4, 5 or S1 nerve root distribution, and no long track signs of spasticity. In addition, Dr. Maletz noted that there was no sign of degeneration in the hips of the sacroiliac joints bilaterally. In his follow-up report dated February 24, 1997, Dr. Maletz noted that straight leg raising on the left was positive for lateral proximal thigh pain, but again noted that motors, reflexes and sensibilities distally were intact, with no evidence of pulse deficit. In his final report of record dated May 11, 2000, Dr. Maletz noted that he had not seen appellant since 1997, and that since that time appellant had had a battery pack removed as it was causing some muscle spasms. Dr. Maletz stated that appellant continued with dysfunctional muscle spasms in his right leg but was ambulatory on his Canadian crutches. Dr. Maletz further stated,

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

[4] *Thomas E. Stubbs*, 40 ECAB 647 (1989).

[5] *Gary L. Loser*, 38 ECAB 673 (1987).

[6] *E.g., Timothy J. McGuire*, 34 ECAB 189 (1982).

[7] *Rozella L. Skinner*, 37 ECAB 398 (1986).

however, that both hip joints remained normal, that his S1 joints were symmetrical bilaterally, and that he had intact sensitivity. Straight leg raising was negative bilaterally and although appellant had a slightly externally rotated right lower extremity, he was able to rotate it to neutral. In addition, Dr. Maletz noted that, while appellant continued to have muscle spasms over the quadriceps, his L5 and S1 roots were intact, reflexes were symmetrical and there were no signs of long track irritability.

The record also contains a medical report from Dr. Enzo J. Sella, a Board-certified orthopedic surgeon, who performed a March 2, 1999 second opinion examination of appellant in connection with appellant's prior recurrence claim. Dr. Sella noted that appellant's gait was "grossly abnormal" in that he walked with a "stiff-kneed spastic type gait," but had no evidence of leg atrophy or any systemic neurological disease. Dr. Sella stated that appellant's gait was "unexplainable" and "inappropriate." Dr. Sella further noted that appellant complained of pain on straight leg raising, but that deep tendon reflexes are 2+ knees symmetrical, plus 1 ankles bilaterally and symmetrically, and sensation to pinprick was normal throughout the lower extremities. In addition, "strength of hamstrings, quadriceps, anterior tibial, gastrocnemius, EHL, FHL is 5/5 bilaterally and symmetrically without any signs of giving way."

In this case, Dr. Maletz, appellant's attending Board-certified orthopedic surgeon, found that he had a marked gait abnormality as a result of his accepted back condition. Dr. Sella, an Office referral physician and also a Board-certified orthopedic surgeon, found that appellant's grossly abnormal gain was "unexplainable" and "inappropriate" for his injury.

Section 8123(a) of the Act provides that, when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[8] When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.[9] As there is a disagreement between appellant's attending physician, Dr. Maletz, and Dr. Sella, the Office referral physician, as to whether appellant has a permanent impairment due to gait derangement causally related to his accepted back conditions, a conflict under 5 U.S.C. § 8123(a) is created.

On remand, the Office should refer appellant, the case record and the statement of accepted facts to an impartial medical specialist for an evaluation consistent with the fifth edition of the A.M.A., *Guides* and the Office's procedure manual to determine the degree of permanent impairment of appellant's left lower extremity. The Office should authorize the impartial medical specialist to take appropriate x-rays and perform such diagnostic tests as he or she deems necessary to render an independent rationalized decision.

[8] *Robert W. Blaine*, 42 ECAB 474, 479 (1991); 5 U.S.C. § 8123(a).

[9] *See Robert D. Reynolds*, 49 ECAB 561, 565-66 (1998).

The decision of the Office of Workers' Compensation Programs dated January 2, 2001 and finalized January 8, 2001 is hereby set aside and the case is remanded for further development consistent with this decision.

Dated, Washington, DC
April 12, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member